IN THE MATTER OF LICENSE NO. 316126
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Patrick KELLY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1794

Patrick KELLY

This appeal has been taken in accordance with Title 46 United States Code 239 (g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 23 April 1968, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for six months upon finding him guilty of negligence. The specifications found proved allege that while serving as pilot on board SS TEXACO MASSACHUSETTS under authority of the license above captioned, on or about 16 June 1966, Appellant:

1) while pilot of a privileged vessel in a crossing situation failed to maintain course and speed as required by 33 U.S.C. 206 in meeting SS ALVA CAPE;

2) also failed to sound a danger signal; and

3) failed to sound a three blast signal when backing in view of ALVA CAPE.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

Both sides had ample time to introduce evidence. The hearing lasted from 5 August 1966 to sometime in 1968. Much evidence including testimony of witnesses and about one hundred exhibits was introduced by both sides.

On 23 April 1968 the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of six months.

The entire decision was served on 26 April 1968. Appeal was timely filed on 1 May 1968 and was completed in September 1969.

FINDINGS OF FACT

On 16 June 1966, Appellant was serving as pilot on board SS TEXACO MASSACHUSETTS and acting under authority of his license.

On that date TEXACO MASSACHUSETTS, a coastwise, seagoing steam vessel, was sailing under an enrollment and license and at the time in question was not on the high seas.

TEXACO MASSACHUSETTS was unmoored from Pier 35 in Newark Bay, assisted by the tug LATIN AMERICAN, and, by 1305 (Zone plus 5 time) was headed south in Newark Bay South Reach, bound for sea via Kill Van Kull and New York Bay, with an engine speed of half ahead. At about 1307, ALVA CAPE was sighted to port proceeding westward in Kill Van Kull under the Bayonne Bridge. TEXACO MASSACHUSETTS reduced to slow ahead and blew a one blast signal. ALVA CAPE replied with one blast.

Subsequent to this exchange TEXACO MASSACHUSETTS reduced to dead slow at 1308 1/2 and increased to half ahead at 1309. At this time the vessel was making about two to two and one half knots. At the same time there was a second exchange of one blast signals.

At 1309 1/2, Appellant perceived that ALVA CAPE was not giving way and that risk of collision existed. The engine of TEXACO MASSACHUSETTS was backed full. Despite the backing, the vessels collided at 1312 with TEXACO MASSACHUSETTS striking the starboard side of ALVA CAPE, in the vicinity of Bergen Point.

At the time of collision, ALVA CAPE was inbound from New York Bay via Kill Van Kull to Bayway. This meant that the vessel was not to turn right at the junction of the channels, so as to proceed to Newark Bay, but was to continue ahead through kill.

The collision resulted in a catastrophe with the loss of many lives.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. In view of the disposition to be made of this case a condensation of the multitudinous material furnished on appeal need not be undertaken.

APPEARANCE: Brush & Brush, New York, New York by Joseph M. Brush and Joseph M. Brush, Jr., Esq., with Milton Grace, Esq. of Washington, D. C., on appeal.

OPINION

I

There is a threshold question. The Examiner made a point of the question of jurisdiction in this case, noting that he had to reconvene the hearing at a special session on his own motion because no proof until then had been provided that Appellant was serving aboard TEXACO MASSACHUSETTS under authority of his Federal pilot's license. He said:

> "On the session of the hearing called by the Examiner, the Government produced, without opposition on the part of the Defense, evidence that the TEXACO MASSACHUSETTS at all pertinent times, was a documented vessel of the United States, which thereby required a federal license to be in charge of her int the pilotage involved. 46 U.S.C. 673." D-18

Although the question of jurisdiction is not raised by Appellant this statement is so erroneous as to require comment.

46 U.S.C. 673 has nothing to do with pilotage at all.

The statute to which the Examiner should have referred is 46 U.S.C. 364.

Under this, it is not sufficient to establish jurisdiction that a vessel is a documented vessel of the United States. The important consideration, in this context, is that the vessel be a coastwise, seagoing steam vessel, not under register, i.e., sailing on enrollment and license or license.

The error is not fatal. I look beyond the Examiner's findings to the record itself, and find that the document under which the vessel was sailing was an enrollment and license, not a register.

This opinion is not to be construed as implying that the sole basis for jurisdiction in a case involving a Federally licensed pilot is that the vessel must be a coastwise, seagoing steam vessel sailing on enrollment and license. There are other bases for jurisdiction, but in this case it is essential to know the nature of the vessel's document.

II

TEXACO MASSACHUSETTS was southbound in the south reach of Newark Bay Channel, ALVA CAPE westbound in Bergen Point East Reach of the Kill. [The vessels were thus on crossing courses. El Islea, CA 2 (1939), 101 F. 2nd 4 (reversed on other grounds, Postal

Steamship Corp. v. El Islea, 1940, 308 U.S. 378) TEXACO MASSACHUSETTS was thus the privileged vessel.

This was the theory of the first specification. It was the theory on which Appellant defended, and it was the theory on which the Examiner decided that Appellant had violated his duty as pilot of a privileged vessel.

The Examiner correctly saw that the requirement to maintain course and speed is not inflexibly absolute but permits those variations that are to be expected considering the circumstances. United States v. SS SOYA ATLANTIC, CA 4 (1964), 330 2nd 732. The Examiner found no fault with the necessary changes of heading of the vessel, but stressed the backing down of the vessel at 1309.5 as an impermissible change in speed.

A serious question the arises whether this was a maneuver in extremis.

III

A cardinal fact in this consideration is that an agreement to cross in accordance with the rules had been made by exchange of whistle signals. (While the Examiner's resolution of conflicting evidence as to signals is not entirely satisfactory, it may be mentioned that the pilot of ALVA CAPE testified that he was the one who initiated the proposal.) ALVA CAPE had therefore promised to keep out of the way and not to interfere with the privileged vessel's crossing safely ahead.

As to the situation at 1309.5, the Examiner's findings are unsatisfactory, and some comment is needed because the argument has been made that it TEXACO MASSACHUSETTS had not backed down it would have crossed safely ahead of ALVA CAPE.

The Examiner found the distance between the vessels at that time to be 1200 to 1500 feet, with ALVA CAPE twenty degrees on the port bow of TEXACO MASSACHUSETTS. Speed of TEXACO MASSACHUSETTS was found to be not more than 2.5 knots, while that of ALVA CAPE was placed at about six knots. These findings do not stand analysis.

The findings as to bearing and distance place TEXACO MASSACHUSETTS at about either 1100 feet or 1400 from the point of collision, depending on which extreme of "line of sight" distance between the vessels is used, and, similarly place ALVA CAPE at anywhere from 480 to 540 feet from the point of collision.

It is obvious that ALVA CAPE would have passed the collision

point long before TEXACO MASSACHUSETTS could have reached it. I need not speculate on what spectacular backing activity by ALVA CAPE might have done to alter the situation. We are concerned, at the moment, only with what TEXACO MASSACHUSETTS did.

At 2.5 knots, to use the higher speed found by the Examiner, if TEXACO MASSACHUSETTS had not backed, it would have traveled only about 638 feet between 1309.5 and 1312. Not only would the vessel not have been able to cross ahead of ALVA CAPE, it would have been from 500 to 800 feet short of the collision point. While it is clear that the Examiner's findings are not supportable, it is even more clear that the backing of TEXACO MASSACHUSETTS did not contribute to the collision. Only a significant speeding up of the vessel would have allowed it to cross ahead. To find a failure to speed up as contributory would require a doubly objectionable theory that Appellant would have had to anticipate just how much the ALVA CAPE would give way, at a time when it had given no visible indication that it was giving way, as it had promised to do with sound signals, and just how much extra speed he could obtain to shave his 600 foot length ahead of the stem of the oncoming burdened vessel when he had a duty to maintain course and speed.

The very statement of this proposition calls for its rejection. The laws were designed to prevent collision, not to invite games of chance.

IV

In view of the failure of the Examiner to make adequate findings (or to refuse to make findings if he found no adequate basis for them), there could be two courses open to me at this point. One would be to remand the case for new findings. A difficulty with this is that the Examiner who heard the case has become unavailable by reason of transfer to another agency. Reference to another Examiner would be required, or I could substitute new findings myself. The cubic footage of record in this case, involving a collision which occurred in June 1966, with hearing proceeding running from August 5, 1966 to April 23, 1968 and Appellant actions through September 1969, makes me loath to reopen the matter. If proper findings cannot be made on a record of testimony of about 1500 pages, plus 100 exhibits, in this time, reopening of proceedings would seem to be inappropriate.

There is the further consideration that I am convinced, on the whole record, that Appellant acted in extremis when he backed down. If speculative findings were substituted for those of the Examiner who heard the case, I do not see how the in extremis condition of Appellant when he backed down can be avoided. A pilot or other conning officer is required to back down when collision is

imminent, whether to avoid collision or to minimize danger. On the whole record here I cannot find a fault in Appellant's backing down when he did. Having rejected the theory that his maintaining course and speed would have brought him safely across the bow of ALVA CAPE, I can find only that his backing was an extremis maneuver.

V

The findings as to the whistle signals given were, as I have said, not completely adequate. The opinion which gives the reasons for adopting the findings is somewhat less so, especially as it supports findings of fault on Appellant's part in failing to sound danger and backing signals. There is a mingling of the language of meeting situations ("starboard to starboard passing") with that applicable to crossing situation. There is a misconstruction of a regulation and of the law. The Examiner says:

> "In a crossing situation, which was involved between the TEXACO MASSACHUSETTS and the ALVA CAPE as will be hereinafter discussed, there are no provision in the Inland Rules authorizing a burdened vessel to blow such signals. They are permissive at best...these signals did not mean that the ALVA CAPE was going to her right. See 33 CFR 80.03(3)." D-40

It is obvious that if a signal is "permissive", as the Court of Appeals for the Second Circuit has often held for proposals by crossing vessels, it must be authorized. But item (3) in 33 CFR 80.3 has been completely misread. That regulation states that a one blast signal is a proposal to go to the right except when it is given by a privileged vessel in a crossing situation when it means "I intend to hold course and speed." The exception, it is clear, is only for the meaning of a privileged vessel's signal, not for the meaning of the signal given by the burdened vessel. This opinion of the Examiner, incidentally, is an indication of his uncertainty of the facts. He found that TEXACO MASSACHUSETTS initiated the crossing agreement, but speaks here as though ALVA CAPE initiated the proposal. Of course, nothing prevents a burdened vessel in a crossing from announcing its intention to meet its burden by going under the stern of the privileged vessel.

All in all, the confused opinion does not generally support the findings and the conclusions of fault.

VI

To turn first to the question of the danger signal, for that is one which the Examiner felt should have been sounded before the backing signal, the opinion says:

> "The Examiner is of the further opinion that the person charged should have blown a danger signal to the ALVA CAPE at least by 1309 EST in view of the fact that the evidence indicates that both he and the late Captain Pinder had grave doubts as to the destination of the ALVA CAPE from the time that the vessel was first sighted [at 1307]." D-51

The selection of 1309 as the latest time by which a danger signal should have been blown as soon as the course or intention of the other vessel is in doubt, on the Examiner's theory the signal should have been blown at 1307. But the Examiner's theory is wrong.

It is true that Appellant had no way of knowing whether ALVA CAPE was bound for Bayway or Port Newark. The ultimate destination of a vessel is irrelevant in a crossing situation. The ?intent" contemplated by the statute is the intent with respect to the immediate situation of meeting, passing, or crossing. ALVA CAPE's intent was known from its one blast crossing signal. It had promised to keep out of the way of the privileged TEXACO MASSACHUSETTS by the use of any means necessary.

VII

There is a theory which could pinpoint the moment at which Appellant should have sounded a danger signal. The Examiner found two exchanges of one blast signal,l both initiated by TEXACO MASSACHUSETTS. The argument could be made that the second proposed by TEXACO MASSACHUSETTS was prima facie evidence of doubt that ALVA CAPE intended to comply with its promise to keep clear.

Following the majority of Federal court decisions, indeed all of those in which the issue has been specifically faced, I have held that a sounding of a second crossing signal after an unanswered crossing signal is improper and that, if another signal is considered desirable, the danger signal is the only one allowable. Decision on Appeal No. 1570.

In the instant case I could possibly substitute my opinion for the Examiner's and say that repetition even of a duly answered signal was an indication of doubt necessitating a danger signal.

There are several reason why I am not persuaded to pursue this line at this time.

One is that to do so would break new ground in a fact situation different from those in the precedents relied on in

Decision No. 1570, i.e., this is not a case of repetition of an unanswered signal. Then too, the second proposal was assented to.

The argument was not made at hearing that the repetition was of itself an admission of doubt and Appellant had no opportunity to present evidence and argue that the very fact that he still perceived that a crossing in accordance with the rules was possible, hence his one blast signal, and that the pilot of ALVA CAPE still saw fit to agree to a crossing in accordance with the rules, established that a danger signal was not yet called for.

If the findings of fact were presented with sufficient clarity, or even if the record permitted my making new and firm findings of fact upon substantial evidence in addition to those made by the Examiner, a change of theory could be justified in a decision on appeal, even without argument, but such is not the case.

Here again a remand would be necessary to straighten out the record. For the reasons given in IV above, this would not be profitable.

VIII

With the necessary rejection of the Examiner's "danger signal" theory, I must say now that at the time Appellant failed to sound a backing signal the vessel was already in extremis and that I am not persuaded that the vessel was not already in extremis at the time when a danger signal became appropriate. As to the latter point two things are significant. Appellant had a right to rely on ALVA CAPE's original promise to keep clear. Whether the affirmation of the agreement was proper it seems that the very fact that the two pilots renewed the agreement that ALVA CAPE would keep clear is evidence that the proposed crossing in accordance with the rules could take place. The inference could be rebutted by reliable evidence, and findings based thereon, that the distance between the vessels and their speeds at the time were such that the agreement was obviously irrational. Such findings were not made and such evidence is not readily apparent in the record.

It was therefore at sometime between 1309 and 1309.5 that Appellant perceived that ALVA CAPE was not living up to its agreement. At that moment a danger signal was called for but at that moment the vessel were in extremis.

The pilot of ALVA CAPE was aware that there was grave danger of collision and was aware that TEXACO MASSACHUSETTS was backing prior to collision. Appellant's failure to sound the danger and backing signals did not contribute to the collision, which had, on

this record, become inevitable by the time Appellant failed to sound the two signals required by law.

IX

The remaining question then is whether appellant should be found negligent for failing to sound two required sound signals, in extremis, when the signal would have conveyed no information not already available to the other vessel.

In Decision on Appeal 1570, cited above in connection with the repetition of crossing signals, a pilot was held at fault for giving a second crossing signal instead of a danger signal when his first signal was unanswered even though the failure did not in fact contribute to the collision because the other vessel did not hear any of the three signals given by the pilot, the middle of which should have been the danger signal. Several distinctions can be made between that case and this (one has already been made in VIII, above), but the significant one for the present purpose is that the vessels were not there in extremis when the danger signal had become appropriate. The pilot there had no right to assume ahead of time that his second signal, a danger signal, would not be heard by the other vessel even though his first signal had not been answered. In fact, by sounding a new crossing proposal he was assuming that it would be heard. It was only accidentally, because of the denial of those on the other vessel that they heard any signals at all, that the failure to sound the proper signal did not in fact contribute to the collision

It is true that two different considerations are involved here. The Rules of the Road are mandatory. There is no need for a collision to occur for a violation of the Rules to have bee committed, and there is no need to find a violation of the Rules contributory to a collision which did occur in order to find a violation of law.

The fault of a pilot of a vessel, with respect to the Rules of the Road, cannot be equated to or limited to the fault of a vessel in collision as found in the admiralty court: The courts, in dealing with collision, are dealing with vessels, not the individual faults of individual persons. The "statutory fault" and the "major-minor fault" rules are too familiar to bear reciting, but they are not determinative of whether a pilot is negligent so as to warrant suspension or revocation of his license. See Decision on Appeal No. 1670.

There are occasions conceivable in which a pilot's vessel could be held relatively faultless in a collision so as to exonerate the vessel from liability in admiralty while the pilot

himself could be held negligent in a proceeding to suspend or revoke his license. It is not decisive in this proceeding that the faults of ALVA CAPE were so much greater than those of TEXACO MASSACHUSETTS that the major-minor fault rule might be invoked in a court. What is decisive, in my mind, is that Appellant's failures to sound signals were, on this record, merely technical violations of law, committed in extremis, at a time when they did not contribute to the collision and at a time when they would not have helped to avert a collision. When a pilot has acted in accordance with law and with agreements made pursuant to law and is forced to resort to emergency action, I do not think a merely technical violation of a rules, a described above, is sufficient reason to suspend his license.

X

One last comment must be made here. In holding the failure to sound a backing signal a fault, the Examiner said, with apparent strong reliance:

> "IN Mission San Rafael - Agioi Anargyroi, 1967 AMC 2244, a privileged vessel was held solely at fault by failing, among other things, to blow a backing sinal, the Court apparently being influenced greatly by the fact that not only was a backing signal not blown, but that the navigator was unaware that such was required on. reversing..." D-51

This citation was irrelevant to the instant case and was inappropriate for other reasons. The report in American Maritime Cases was not a "report"; it was a capsule summary of findings of the U. S. District Court for the Middle District of Florida, from an apparently unreported decision, which was affirmed per curiam in Marinvicto Compania Naviera v. United States, CA 5 (1967), 381 F. 2nd 482, in an opinion which stated only that the appeal challenged only findings of fact by the District Court which would not be reviewed by the Court of Appeals.

Nothing in the reported decision of the Court of Appeal or in the AMC capsule indicates under what circumstances the privileged vessel backed down without a signal. It is easily seen that a privileged vessel could back down under such circumstances as to mislead a burdened vessel which was essaying to go under the stern of the privileged vessel, but this does not imply an absolute duty not to back down in a dangerous situation or in, especially, an in extremis situation. The fact that the navigator in that case was unaware of the duty to sound a backing signal and that this ignorance profoundly affected the court is totally irrelevant to the instant case.

ORDER

The order of the Examiner entered at New York, New York on 23 April 1968, is SET ASIDE. The findings and conclusion of the Examiner are also SET ASIDE and the charges are DISMISSED.

C. R. BENDER
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 18 day of June 1970.

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